82-426

No. _____

Office - Supreme Court, U.S.
FILED
SEP 9 1982
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1982

ROBERT M. SNELL and ROSALIE J. SNELL,
Husband and Wife,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOHN P. RAYNOR
SCHUMACHER, SKUDLAREK,
RAYNOR & SMITH

540 Continental Building
Omaha, Nebraska 68102
(402) 342-7745

Counsel for Petitioner

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTIONS PRESENTED

Petitioner respectfully submits for the Court's consideration the following questions:

(1) In the interpretation of Federal taxing statutes, may Federal Courts ignore the Cannons of Statutory Construction, when, if said Cannons were applied, the resulting interpretation would be consistent with the legislative intent in enacting said statutes.

In order to apply the Assignment of Income Doctrine, the Eighth Circuit concluded the allocation of loss was for the purpose of "tax avoidance".

(2) Did the Eighth Circuit reach a factual conclusion, tax avoidance, which is unsupported by the record thereby improperly denying a trial?

(3) Does the Assignment of Income Doctrine, as a matter of law, prohibit the allocation of preadmission loss to a newly admitted partner?

TABLE OF CONTENTS

Pages

Questions Presented i

Table of Contents ii

Table of Authorities iii

Opinions Below 2

Jurisdiction 2

Statutes Involved 2

Statement of Case 3

I. The canons of statutory construction must be applied if the legal interpretation resulting therefrom is consistent with the legislative intent. 3

II. The Court improperly applied the rules that relate to summary judgments to decide facts to support the application of legal principals. 18

III. The Assignment of Income Doctrine is not applicable to partnerships. 20

Reasons for Granting Writ:

Certiorari should be granted when a Federal Court of Appeals has decided a federal question in conflict with applicable decisions of the Supreme Court. 24

Appendix A ..... App. 1

Appendix B ..... App. 9

Appendix C ..... App. 18

Appendix D ..... App. 28

TABLE OF AUTHORITIES

CASES:

	Pages
Arthur v. Cumming, 91 U. S. 362	21
Ash Sheep Co. v. U. S., 252 U. S. 159	17
Atlantic Cleaners and Dryers v. U. S., 286 U. S. 427	17
Bontany Worsted Mills v. U. S., 278 U. S. 282	21
Boynton, 72 T. C. 1147, Aff'd 649 Fed. 2d 1168 (C. A.-5)	26
Comm. v. Culbertson, 337 U. S. 733, 746	22, 23, 24, 25
Comm. v. Tower, 327 U. S. 280	23
Costanzo v. Tillinghast, 287 U. S. 341	17
Dalehite v. U. S., 346 U. S. 15	17
Durand A. Holladay, 72 T. C. 571, Aff'd 649 Fed. 2d 1176 (C. A.-5)	26
Ebert v. Postum, 266 U. S. 548	17
David A. Foxman, 41 T. C. 535, Aff'd 352 F. 2d 466	5, 6
Gregory v. Helvering, 293 U. S. 465	19
Helvering v. Credit Alliance Corp., 316 U. S. 107	17
Helvering v. Stockholms Enskilda Bank, 293 U. S. 84	17
Holden v. Stratton, 198 U. S. 202	17
Jackson Investment Company, 41 T. C. 675, Rev. 346 F. 2d 187 (1965)	5
Julian T. Jacobs, T. C. Memo, Dec. 1974-196	5
Lusthaus v. Comm., 327 U. S. 293	23
McDonald v. Thompson, 305 U. S. 263	17
National Park Bank v. Remsen, 158 U. S. 337	17

TABLE OF AUTHORITIES—Continued

Pages

Penn Mutual Life Insurance Company, 252 U. S. 523 14

Piedmont & N. R. Co. v. I. C. C., 286 U. S. 299 17

Poller v. Columbian Broadcasting System, Inc., 368 U. S. 464, 7 L. Ed. 2d 458, 82 Sup. Ct. 486 25

Raleigh & G. R. Co. v. Reid, 80 U. S. 269 21

Rodman, 545 F. 2d 845 (C. A.-2, 1976) 3, 6, 7, 8, 20, 21

Rogers, 103 Fed. 2d 790 (9th Cir. 1939) 5

Shropshire, W. & Co. v. Bush, 204 U. S. 186 17

Teamsters v. U. S., 431 U. S. 324 14

U. S. v. Allen, 163 U. S. 499 17

U. S. v. Basye, 410 U. S. 441 (1973) 22, 25

U. S. v. Cooper Corp., 312 U. S. 600 17

U. S. v. First Nat. Bank, 234 U. S. 245 17

U. S. v. Fisher, 109 U. S. 143 17

U. S. v. N. E. Rosenblum Truck Lines, Inc., 315 U. S. 50 17

U. S. v. Price, 361 U. S. 304 ..... 14, 26

U. S. v. Public Utilities Com., 345 U. S. 295 17

Vogel Fertilizer Co., S. Ct., No. 80-1251 (1/13/82), 82-1 U. S. T. C. ¶ 9134 ..... 13, 14, 26

TABLE OF AUTHORITIES—Continued

STATUTES:

	Pages
IRC § 44A	25, 26
IRC § 48(a)(1)(A)	26
IRC § 104(e)	20
IRC § 214	25, 26
IRC § 702 (a)	12
IRC § 702 (a) (1) through (8)	10, 13
IRC § 703 (a) (1)	10
IRC § 704	4, 7, 15
IRC § 704 (a)	4, 6, 10, 14, 15, 16, 21
IRC § 704 (b)	10, 11, 12, 26
IRC § 704 (e)	21, 23
IRC § 706	7, 12, 15
IRC § 706 (a)	4
IRC § 706 (c)	7, 8, 10, 11, 12, 13, 14, 15
IRC § 706 (c) (1)	14, 15, 16
IRC § 706 (c) (2)	8, 10, 14, 15
IRC § 706 (c) (2) (A)	8, 14, 16
IRC § 706 (c) (2) (B)	3, 6, 8, 11, 13, 14, 16
IRC § 708	7, 10, 15
IRC § 731 (a)	5

TABLE OF AUTHORITIES—Continued

	Pages
IRC § 736	4
IRC § 741	4, 5
IRC § 751	4, 5
IRC § 751 (c)	5
IRC § 761 (c)	4, 16, 22
IRC § 761 (d)	4, 5
Rule Cited:	
Federal Civil Procedural Rule 56(c)	25
Other Authorities:	
Senate Finance Committee's Reports; U. S. C. C. A. N., Vol. 3, 83rd Cong., 2nd Sess., 1954	
pp. 5020-21	12, 13
p. 4722	13
p. 4723	22
p. 5019	13
p. 5028	9, 13
p. 4724	9
S. Rept., No. 1622, 83rd Cong., 2nd Sess., p. 89	6
S. Rept., No. 938, 94th Cong., 2nd Sess. 98 (1979)	19

TABLE OF AUTHORITIES—Continued

Pages

H. Reports

p. 1814 23

pp. 4091-4092 12

p. 4362 13

p. 4366 ..... 9, 13

p. 4093 9

H. Rept., No. 1137, 83rd Cong., 2nd Sess., p. 65 6

H. R. Rept., No. 658, 94th Cong., 1st Sess. 124 (1975) 19

H. R. Rept., U. S. C. C. A. N., Vol. 2, 82nd Cong., 1st Sess., p. 1814 23

Federal Taxation of Partners and Partnerships by McKee, Nelson and Whitmire, 1982 Cum. Supp., No. 2, ¶ 10.02 (3) 16, 22

Reg. 702 (a) (9) 12

Reg. 702 (d) 12

Reg. 703 (a) (1) 12

TABLE OF AUTHORITIES—Continued

	Pages
Reg. 1.704-1 (a)	6
Reg. 1.704-1 (b) (1) (2)	12
Reg. 1.706-1 (c) (2) (ii)	12
Reg. 1.706-1 (a)	4
Reg. 1.761-1 (c)	4
Reg. 1.731-1 (a) (1) (ii)	5
Reg. 1.761-1 (d)	5
Rev. Rul. 76-189, 1976-1-C. B. 181	6

No. _____

In The

Supreme Court of the United States

October Term, 1982

ROBERT M. SNELL and ROSALIE J. SNELL,
Husband and Wife,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

TO: The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Robert M. Snell and Rosalie J. Snell, the Petitioners herein, pray that a Writ of Certiorari issue to review the Judgment of United States Court of Appeals for the Eighth Circuit entered in this matter on June 18, 1982.

OPINIONS BELOW

The June 18, 1982, opinion of the Court of Appeals for the Eighth Circuit whose judgment is herein sought to be reviewed is 680 F. 2d 545 (1982). Such judgment is reprinted in a separate appendix to this Petition, p. App. 1. The opinion of the United States District Court for the District of Nebraska, also reprinted in the appendix, is not officially recorded. Its unofficial citation is No. CV80-L-57 (D. Neb., Sept. 14, 1981), 81-2 U. S. T. C. ¶ 9705.

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1982. The Petition for Rehearing was denied July 26, 1982. Jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254 (1).

STATUTES INVOLVED

The statutes are set out in the appendix.

STATEMENT OF CASE

The Petitioner filed a complaint, for refund of Federal income taxes erroneously paid, in Federal District

Court for the District of Nebraska pursuant to 28 U. S. C. 1346 (a). After the submission of pleadings and prior to any discovery, the Government's attorney submitted the following issue on a motion for summary judgment, "Whether a partner who acquired an interest in a partnership can offset his taxable income by losses incurred by the partnership prior to the acquisition." Petitioner's understanding of the motion is that it questions whether the rule of *Rodman*, 545 F. 2d 845 (C. A.-2, 1976) is correct law and whether such rule applies regardless of the way the new partner enters the partnership; capital contribution versus sale or exchange. (SEE pleading submitted July 9, 1980, Item 9 of designated record.) The District Court ruled that IRC § 706 (c) (2) (B) as in effect for 1975 and the Assignment of Income Doctrine prohibited the allocation of loss to a newly admitted partner, who was admitted by virtue of a capital contribution. The United States Court of Appeals for the Eighth Circuit affirmed the District Court's decision on June 18, 1982.

I. The canons of statutory construction must be applied if the legal interpretation resulting therefrom is consistent with the legislative intent.

The issue presented to the District Court concerned the propriety of a partnership allocating taxable loss to a newly admitted partner, which loss was incurred prior to such partner's admission. The general statutory

scheme setting out the partners' authority to allocate income involves Code §§ 704, 706 (a) and 761 (c). IRC § 704 (a) provides the general rule that *except as otherwise provided in that section,* a partner's distributive share of income, gain, loss, etc. shall be determined by the partnership agreement. IRC § 706 (a) provides that income is deemed to be allocated to the partners as of the last day of the partnership year. Reg. 1.706-1 (a). The purpose of IRC § 761 (c) is to define the term "partnership agreement" for purposes of the subchapter, especially for purposes of the general rule set out in § 704 (a). That section provides that an agreement includes all modifications to a partnership agreement up to the time fixed by law for filing a return. Reg. 1.761-1 (c). The interrelationship between these three provisions of Subchapter K infer a scheme of taxation that is extremely flexible with respect to the allocation of partnership income among partners.

IRC §§ 736, 741, 751, and 761 (d), in addition to the above, provide a statutory scheme which was generally deemed applicable to partners' dispositions of their interest in a partnership. Congress recognized that admission of a new partner by virtue of a capital contribution or a disposition by a partner of a portion or all of his interest in a partnership was a matter which involved all partners. An overwhelming majority of states provide that an individual who purchases an existing partner's interest in a partnership does not become a partner without the consent of existing partners. Consequently, the substantial differences in the taxation of a liquidation of a partner's interest, governed by IRC § 736, and a partner's sale or exchange of his interest, governed by IRC § 741, were

deemed to be a matter of form to be determined by the partners themselves. *David A. Foxman*, 41 T. C. 535, Aff'd 352 F. 2d 466; *Jackson Investment Company*, 41 T. C. 675, Rev. 346 Fed. 2d 187 (1965); *Julian T. Jacobs*, T. C. Memo, Dec. 1974-196. IRC § 761 (d) relates to the interplay of these two sections by providing that a partner whose interest is being liquidated over a series of distributions will be deemed to be a member of the partnership (in other words, will be deemed to be participating in income) until his interest is fully liquidated. Reg. § 1.761-1 (d); Reg. § 1.731-1 (a) (1) (ii).

IRC § 751 limits a partner's ability to determine the character of income (ordinary versus capital), pursuant to the partners' ability to choose the form of the transaction, by providing payments deemed attributable to unrealized receivables and substantially appreciated inventory items would be treated as ordinary income. The term "unrealized receivables" is broad and extremely inclusive. IRC § 751 (c).

In addition to the preceding, the subchapter provided an extensive statutory scheme devoted to determining a partner's basis in his partnership interest. In essence, a partner's basis reflects the partner's distributive share of income, capital contributions, and capital draws. Thus, it becomes the final arbitrator insuring that after a partner has severed his interest in a partnership, any excessive tax benefits will be recouped as capital gain and any excessive costs to the partner, not previously recognized for tax purposes, will be recognized as capital loss. IRC § 731 (a); IRC § 741; Rev. Rul. 76-189, 1976-1-C. B. 181; *Rogers*, 103 Fed. 2d 790 (9th Cir. 1939).

The general statutory framework is extremely broad allowing partners to generally, by agreement, determine their own distributive shares of partnership income and their distributive share of items that were required to be separately stated on the partnership return. This broad pattern of flexibility is consistent with the legislative intent expressed by Congress:

> "In establishing a broad pattern applicable to partnerships generally, the principal objections have been simplicity, flexibility, and equity as between partners." S. Rept. No. 1622, 83 Cong., 2nd Sess., p. 89; H. Rept. No. 1137, 83 Cong., 2nd Sess., p. 65.

David A. Foxman, supra, provides one of the most thorough discussions of the legislative intent in enacting the provisions of Subchapter K.

It was not until 1976, in a case where the Commissioner conceded an argument which he won in a tax court, that a case first held that the statutory scheme stated above was inapplicable to an allocation to a new partner admitted by virtue of a *purchase* of an interest from existing partners. *Rodman v. Commissioner*, 545 Fed. 2d 845 (C. A.-2, 1976); Rev'd T. C. Memo. 1973-27, 32 T. C. M. 1307. The taxpayer's position in *Rodman*, supra, not only required an interpretation of IRC § 706 (c) (2) (B) that is in conflict with the general rule stated in IRC § 704 (a), but it also conflicted with the Treasury Department's own regulation. Reg. § 1.704-1 (a). The theory expounded in that case and subsequent cases is a unique theory Petitioner refers to as the "Fragmentation Theory". This theory, unsupported by anything in the committee re-

ports, attempted to interpret § 706 in conflict with § 704 without interpreting § 706 in conflict with IRC § 708. IRC § 708 provided the general rules with regard to partnership terminations. The court in *Rodman* concluded that the partnership year can close only for the limited purposes of allocating income, without closing for any other purposes. This closing prevents the allocation of income or loss attributable to one period to any partner who was not a member of the partnership during that period. This fragmentation theory, that is, mini-years for allocation purposes, can provide for an unlimited number of years within a normal tax year for purposes of the allocation of income or loss.

Petitioner's arguments before the District Court and the Eighth Circuit were principally based upon the Rules of Statutory Construction. The structure of § 706 (c) is critical to its interpretation. Subsection (c) (1) provides the general rule that a partnership shall not close for various reasons including a sale or exchange of a partner's interest or the entry of a new partner, except as provided in Paragraph 2 of such subsection and IRC § 708. Paragraph 2 of Subsection (c) is itself divided into two subsections. Subsection (A) deals with a situation where a partner completely disposes of his interest by either a sale or exchange or a liquidation. Subsection (B) provides rules that deal with a partial disposition as a result of a sale or exchange or a reduction of a partner's interest.

The Petitioner's arguments before the Eighth Circuit and the District Court were based upon interpretation of three key terms in such subsection. These terms are

"item", "reduced", and "close". Petitioner's interpretation of these particular terms is based upon the interrelationship of the code sections and the committee reports surrounding the 1954 code. The resolution or interpretation of any one of these terms in accordance with Petitioner's arguments before the lower courts would have resulted in a decision, with respect to the statutes, in favor of the Petitioner.

The term "close" will be examined first since, investigating its meaning, the purpose of IRC § 706 (c) (2) becomes self-evident. It is the term relied upon but the court in *Rodman*, supra, that created this fragmentation theory; the closing for allocation purposes only. In order to interpret what is now called the Varying Interest Rule, in Paragraph (B) of § 706(c)(2), the court examined the term "closed" in Subparagraph (A) of §706 (c) (2). Of particular interest is the fact the term is used three times within Subsection (c) of § 706. In Paragraph 1, the General Rule, and Paragraph (2)(B) it is used to indicate that the partnership year shall not close. Yet the court's interpretation under *Rodman* required a closing of the partnership year not only with respect to the partner who disposed of his interest but with respect to all partners. The term "close" could not have the same meaning as used in the other parts of the same subsection or else, neither section would make sense. Petitioner resorted to the committee reports and discovered the following.

> "The bill further provides that the taxable year of a partnership is not to close as a result of the admission of a new partner. . . . Thus, it will not be possible by the admission of a new partner to termi-

nate the partnership taxable year and commence a new partnership year. However, the partnership year does close if there is a termination of the partnership.

• • •

While the partnership year does not close for the continuing partners when a partner severs his interest in the partnership, the partnership year does close with respect to such partner." House Report, United States Code Congressional and Administrative News (U.S.C.C.A.N.), Vol. 3, 83rd Cong., 2nd Session, 1954, p. 4093.

"If, however, the partnership is terminated, the taxable year of the partnership will close with respect to all the partners.

• • •

Paragraph (2) provides that, in the case of a partner whose interest is liquidated, or sold or exchanged to an outsider, the taxable year of the partnership shall close with respect to such a partner." House Report, U.S.C.C.A.N., Vol. 3, 83rd Cong., 2nd Session, 1954, p. 4366.

"While the partnership year does not close for the continuing partners when a partner severs his interest in the partnership, the partnership year does close with respect to such partner." S. Rept., U.S.C.C.A.N., Vol. 3, 83rd Cong. 2nd Session, 1954, p. 4724.

"The closing of the partnership taxable year under paragraph (2) occurs only in the case of a partner who no longer retains any interest in the partnership.

• • •

If, however, the partnership is terminated, the taxable year of the partnership will close with respect to all the partners." S. Rept., U.S.C.C.A.N., Vol. 3, 83rd Cong., 2nd Session, 1954, p. 5028.

The above committee reports illustrate that the term "close" means no more than a closing of the tax year for all purposes. Further, the reports specifically state that while the partnership year will close with respect to a partnership who completely disposes of his interest, for continuing partners the year does not close. The fragmentation theory that the year closes for continuing partners, thus prohibiting an allocation to newly admitted partner, is in direct conflict with these committee reports.

To support the court's interpretation of the varying interest rule requires different meanings of the term "close" as used within the section. Secondly, it's for the sole purpose of reading § 706(c)(2) in conflict with the general rule in § 704(a). This fragmentation theory, based upon the term "close", reads such term in conflict with Paragraph (a) of § 708. A restrictive interpretation of the term "close", as applying only to the partner disposing of his interest, enables the term to have the same definition in all places that it is used in § 706(c).

With respect to the term "item", Petitioner argued that the term as used in Section 704 (b) referred to only items that had to be separately segregated and set out on the partnership return. IRC § 702 (a) (1) through (8); IRC § 703 (a) (1). Assuming the Petitioner is correct in that interpretation, Subsection B of § 704 would not restrict rights of partners to allocate income. It would merely test the allocations of specific items to see if the principal purpose was tax avoidance and, if so, reallocate the items in accordance with each partner's distributive share of income as determined pursuant to § 704 (a). Relating that subsection to Subparagraph (c) in § 706, Petitioner argued that after a partner disposed of all or a

portion of his interest in a partnership, § 706 (c) required a re-examination of the allocation of items. If the present allocation (after the sale or liquidation) of such items constitutes tax avoidance, IRC § 706 (c) forces a reallocation of the items pursuant to a partner's *adjusted* distributive share of income. While the District Court did not openly concede Petitioner's definition of the term as used in Section 704 (b), it did feel the argument was strong enough that it had to distinguish the use of the term in Section 706 (c) (2) (B).

Petitioner feels that the use of "item" throughout Subchapter K and the Committee Reports definitely demonstrates that the term "item" cannot be used interchangeably with the term "income". It is not only the structure of § 704 (b) that supports such interpretation but the following Senate Finance Committee's report conclusively so interprets that term.

> "Subsection (b) provides that, where the partnership agreement does not provide specifically for the manner of sharing one or more of the items set forth in section 702 (a) (*other than Paragraph (9) thereof*), then, each partner's distributive share of such item shall be determined in accordance with his distributive share, as prescribed in the partnership agreement, of partnership income or loss, *exclusive of the items required to be treated separately.*
>
> • • •
>
> Subsection (b) further provides that if the principle purpose of any provision in the partnership agreement dealing with a partner's distributive share of a particular item is to avoid or evade the Federal income tax, the partner's distributive share of that item *shall be redetermined in accordance with his distributive share of partnership income or loss described*

> *in section 702 (a) (9).*" (Emphasis added). U. S. C. C. A. N., Vol. 3, 83rd Cong., 2nd Session, 1954, pp. 5020-21.

In addition, the regulations and the use of the term in several code sections also support the interpretation of the term to exclude taxable income or loss. Reg. 1.704-1(b)(1)(2); § 702(a)(9); § 702(d); § 703(a)(1).

In transposing the § 704(b) meaning of the term "item" to § 706(c), the Petitioner relied upon the rule of construction concerning identical expressions, that it is ordinarily regarded as reasonable to presume or conclude, prima facie, that words used in one place in the legislative enactment have the same meaning in every other place in the statute, especially where a word or phrase is repeatedly used therein. To include the term "income" within the meaning of the term "item" as used in § 706, the Court relied upon the citation in such subsection to § 702(a) and Treasury Regulation 1.706-1(c)(2) (ii). The following committee reports in U. S. C. C. A. N., Vol. 3, 83rd Cong., 2nd Sess., 1954, lend further credibility to the interpretation of the term to exclude income.

> "The items required to be segregated will retain their original character in the hands of the partner as though they were realized directly by him from the same source from which realized by the partnership and in the same manner. After excluding the items required to be separately treated, the remaining income or loss of the partnership under present law, is attributed to the partners." H. Rept., pp. 4091-4092.
>
> "Paragraph (9) of Subsection (a) provides that all items of income or loss, not required to be segregated by other provisions of this section, shall be attributed to each partner in accordance with his distributive share." H. Rept., discussing § 702(a)(9) at p. 4362.

> ". . . The classes of items described in Section 702(a) must be separately stated." H. Rept., discussing IRC § 703(a) at p. 4362. Same language at S. Rept. p. 5020.
>
> ". . . After excluding the items required to be separately treated, the remaining income or loss, which corresponds to be ordinary income or loss of the partnership under present law, is attributed to the partners." S. Rept., discussing IRC § 702(a) at p. 4722. SEE ALSO p. 5019 of Detailed Discussion.

More particularly, the committee reports dealing specifically with § 706(c) become a truism if the term "item" includes income and hence, the committee reports would be meaningless.

> ". . . His distributive share of partnership *items* required to be included by him in accordance with Section 702(a) will be determined by taking into account the fact that his *profit interest* may have varied during the partnership taxable year." (Emphasis added.) U.S.C.C.A.N., Vol. 3, 83 Cong., 2nd Session, 1954, H. Rept. at p. 4366, S. Rept. at 5028.

The code itself and the committee reports consistently interpret the term "item" as referring to the items separately stated in IRC § 702(a)(1) through (8). The Treasury Regulation to the extent it is inconsistent with the correct interpretation of the term is void. *Vogel Fertilizer Co.* S. Ct., No. 80-1251 (1/13/82), 82-1 U.S.T.C. ¶ 9134.

If Petitioner's interpretation of "item" is correct, IRC § 706 (c) (2) (B) would *not* prohibit the allocation of loss in this case since all items were allocated in the same proportion as income.

Petitioner cannot understand the lower court's refusal to accept Petitioner's interpretation especially when

such interpretation results in a harmonization within the provisions of § 706(c) itself and harmonization of such section with § 704(a). Further, Petitioner's interpretation is a *narrow* construction of § 706(c)(2) which is an exception to the rule provided in IRC § 706(c)(1).

Petitioner also takes issue with the lower court's interpretation of the term "reduced". Petitioner simply argued that the term as used in Subpart (B) of Paragraph (2) of § 706(c) should be interpreted consistent with Subpart (A) of such section. Subpart (A) comes into play upon either one of two events; a sale or exchange, or a liquidation. Petitioner argued that the term "reduced" referred to a partial liquidation of a partner's interest in a partnership. Such subsection would be totally inapplicable to the present case since the Petitioner acquired his interest in the partnership by virtue of a capital contribution. Instead, the lower courts concluded that *a mere reduction in a partner's percentage interest* regardless of the reason, brought the subsection, IRC § 706 (c)(2)(B), into play and required a fragmentation of the year.

All other courts which have so interpreted the term "reduce" have relied almost exclusively upon the Tax Reform Act of 1976 Committee Reports to interpret a pre-'76 law. This basis for interpretation is in conflict with several Supreme Court decisions. *Vogel Fertilizer Co.*, supra; *U.S. v. Price*, 361 U.S. 304; *Teamsters v. U.S.*, 431 U.S. 324; *Penn Mutual Life Insurance Company*, 252 U.S. 523. While heeding the preceeding authority, the District Court and the Eighth Circuit reached the same result by adopting a new rule of statutory construction; an express exception must be construed as

broadly as the general rule to which it is an exception. The court simply held that because the general rule (IRC § 706(c)(1)) used the term "entry of new partner", the term "reduced" had to be interpreted to include the entry of a new partner. This rule is in conflict with the general Cannon of Construction that exceptions must be given a narrow construction. Further, I fail to see how the general rule is given any meaning if the exception must be interpreted to include all the phrases in the general rule. Again, this term is interpreted broadly to purposely construe § 706 (c) (2) in conflict, not in harmony, with IRC § 704(a).

This new rule results in a conflict broader than just a conflict of § 704 with § 706, and § 706(c)(2) with § 706(c)(1). In order to effect any retroactive allocation even between contemporary partners, at least one partner must reduce his interest in the partnership bringing into play § 706(c)(2) which would fragment the year prohibiting such retroactive allocation. Thus, retroactive allocations between contemporary partners are impossible. Further, partial sale or exchange requires a reduction in a partner's interest so that a portion of the statute becomes redundant with no independent significance.

The cumulative effect of the interpretation given to the three terms in order to prohibit, or find a statutory basis prohibiting, the allocation of income or loss to a newly admitted partner results in an emasculation of the code.

The emasculation of the code, as in effect in 1975, is best illustrated by a review of some of the changes necessary to interpret the code consistent with the lower court's opinions.

(1) In IRC § 704(a) these words, "shall, except as otherwise provided in this section" must be replaced with the word "may".

(2) In IRC § 706(c)(1) after the term "close" and before the phrase "as a result of" the following words should be added: "the taxable year *but for purposes* of allocating income *and* for purposes of § 761(c) the partnership year shall close . . . ".

(3) In IRC § 706(c)(2)(A) a new sentence should be added stating: "such closing for the partner disposing of his interest shall close the year as to all partners for the purpose of allocating income."

(4) IRC § 706 (c) (2) (B) should have several changes.

(A) Behind the phrase "shall not close" there should be added "except for purposes of allocating income or loss".

(B) Behind the term "reduce" the code should provide "for any reason whatsoever".

(5) IRC § 761(c) should be eliminated since at least one partner must reduce his interest for any retroactive allocation. Some people may argue that the case is overstated when it's argued that IRC § 761(c) must be repealed. McKee, Nelson & Whitmire, in their book, *Federal Taxation of Partnerships and Partners,* stated with respect to the 1976 amendments to IRC § 706(c)(2)(B) that, "Unfortunately, the statutory changes, as enacted, are arguably broad enough to prohibit retroactive allocation among contemporaneous partners as well." SEE ¶ 11.04[1], pp. 11-15. The Eighth Circuit's and the District Court's interpretation of the term "reduce" to include a mere reduction of the percentage interest in the partnership is judicial construction of "reduce" as broad

as the authors fear possible. This interpretation of the 1975 code is applicable to the code as amended in 1976.

Throughout the above the Petitioner referred to several rules of statutory construction. These rules are supported by Supreme Court decisions as indicated hereinafter.

(A) Legislative intent is the controlling factor. *U.S. v. N.E. Rosenblum Truck Lines, Inc.*, 315 U.S. 50; *Ebert v. Postum*, 266 U.S. 548; *Ash Sheep Co. v. U.S.*, 252 U.S. 159; *Costanzo v. Tillinghast*, 287 U.S. 341; *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84.

(B) Express exceptions should be narrowly construed. *U.S. v. Allen*, 163 U.S. 499; *Dalehite v. U.S.*, 346 U.S. 15; *U.S. v. Public Utilities Com.*, 345 U.S. 295; *Piedmont & N.R. Co. v. I.C.C.*, 286 U.S. 299.

(C) Parts of the statutes and related statutes should be interpreted to harmonize all sections and all related statutes. *U.S. v. Fisher*, 109 U.S. 143; *McDonald v. Thompson*, 305 U.S. 263; *National Park Bank v. Remsen*, 158 U.S. 337; *Helvering v. Credit Alliance Corp.*, 316 U.S. 107.

(D) Identical expressions should have identical meaning. *Atlantic Cleaners and Dryers v. U.S.*, 286 U.S. 427; *U.S. v. Cooper Corp.*; 312 U.S. 600; *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84.

Further, this case and other cases involving the fragmentation theory amount to judicial legislation under the guise of interpretation. *U. S. v. First Nat. Bank*, 234 U.S. 245; *Shropshire, W. & Co. v. Bush*, 204 U.S. 186; *Holden v. Stratton*, 198 U.S. 202.

Basically, Petitioner feels that the Court should not unduly constrict their interpretations of the Section so

that legislative intent of flexibility and its manifest intent to allow partners to determine their own allocations is not given effect when a new partner is admitted. A restriction of the legislative intent of flexibility is not justified if such interpretation results in taxation when the statute does not otherwise clearly levy the tax.

II. The Court improperly applied the rules that relate to summary judgments to decide facts to support the application of legal principals.

The Court reached a factual conclusion, that the transaction constituted "tax avoidance", in order to apply the Assignment of Income Doctrine. The pleadings only established one relevant fact, "Plaintiff, Robert M. Snell, in 1975 became a general partner in Mid Plains Development Co., a Nebraska general partnership." The only Declaration of Record did not contain any facts. The attempt in the Declaration to incorporate facts in the Respondent's brief must fail since the brief is not part of the record and such facts amount to hearsy since the attorney for the Justice Department did not have personal knowledge of such facts within the meaning of F.R.C.P. 56(e). Basically, the Court was given purely a legal issue to decide. The Petitioner's submission by counsel of the pleading filed July 10, 1980 (Item 9 of the designated record) coupled with continued objections in Petitioner's Brief concerning submission of contested facts in briefs by the government *and* the Justice Department's cover letter to the Honorable Warren K. Urbom, indicating the issue was being submitted by agreement of counsel, unequivocally indicated that the facts of this case were irrelevant to the decision of the Court. Notwithstanding their constant submission of contested facts, the attorneys from the Justice Department never contested Petitioner's

position that the facts of this case were irrelevant to the decision of the legal issue presented. It became apparent that the Court was aware that the Petitioner had substantial means and the Court was concerned that Petitioner had already been allowed a substantial loss. During oral arguments the Honorable Judge Bright was preoccupied with whether or not the Petitioner had "a good deal". Petitioner fails to conceive how, whether the transaction was a good or bad deal, relates to the legal terms of whether or not a newly admitted partner is entitled to an allocation of preadmission income or loss. Further, before trial on its merits, even with the purported facts in the government's brief, there is no evidence regarding the individual partner's interest in cash flow, the nature of the partnership liability (recourse or non-recourse), which partner bore the risk of loss and the *value* of the contributing partner's interest immediately after the contribution as it relates to pre-existing partners' interest (Did he effectively own 100% of the partnership at that time?), etc. Both the District Court and the Eighth Circuit concluded that the application of the Assignment of Income Doctrine was proper since this was a case of "de facto" tax avoidance. Even under the Tax Reform Act of 1976, an incoming partner can deduct expenses "incurred" prior to his admission as long as they were "paid" after his admission. S. Rep. No. 938, 94th Cong., 2nd Sess. 98 (1976); Accord., H. R. Rep. No. 658, 94th Cong., 1st Sess. 124 (1975). The Supreme Court has often held that taxpayers have legal right to decrease their taxes by any legal means. *Gregory v. Helvering,* 293 U. S. 465. How can the Court distinguish legitimate tax minimization from tax avoidance prior to the trial on its merits?

The Eighth Circuit's preoccupation with facts is also illustrated by its erroneous interpretation of law as set out in its opinion. *Rodman,* supra, a sale and exchange case, was cited for its purported interpretation of the term "reduce" which is only applicable to capital contribution cases. Further, the Eighth Circuit stated that *Rodman,* supra, held that the statute would prohibit original partners from sharing in losses disproportionately for the period after the entry of the new partner. None of the cases have been concerned with the allocation of income or loss for the period after entry of the new partner.

In summation, to the extent the court based its application of the Assignment of Income Doctrine upon facts not before the court the decision should be reversed.

III. The Assignment of Income Doctrine is not applicable to partnerships.

The Eighth Circuit and the District Court concluded that the Assignment of Income Doctrine prohibits the allocation of income or loss to a newly admitted partner and that this ground was a separate and distinct basis for the decision. Petitioner takes issue with the Court's decision with respect to the Assignment of Income Doctrine for two separate reasons: (1) the Cannons of Statutory Construction, and (2) its application conflicts with prior Supreme Court cases.

IRC §704 (e) provides specific rules applicable to family partnerships. While these rules expressly state that partnerships created as a result of a gift are to be recognized, they go further and apply specific allocation rules which are similar to a codified Assignment of In-

come Doctrine. It is the general principle of interpretation that to mention one thing implies the exclusion of another; expressio unius est exclusio alterius. *Arthur v. Cumming*, 91 U. S. 362. Hence, a statute that mandates a thing to be done in a given manner, or by certain persons or entities normally implies that it shall not be done in any other manner, or by any other person or entities. *Bontany Worsted Mills v. U. S.*, 278 U. S. 282; *Raleigh & G. R. Co. v. Reid*, 80 U. S. 269. It only seems reasonable, especially in light of the fact that the Assignment of Income Doctrine was well developed by the time the 1954 code was adopted, that Congress would not codify a statute similar to the Assignment of Income Doctrine unless the doctrine is generally not applicable to partnerships. Further, it is clear that the statutory scheme provided in § 704 (a) is narrowed to the extent that § 704 (e) applies. Therefore, if the Assignment of Income Doctrine generally applies to partners it would have the result of replacing a statutory scheme that is broader than such doctrine. This would frustrate the legislative intent in enacting Subchapter K of the code.

Even two key cases which applied the Assignment of Income Doctrine to newly admitted partners conceded that the doctrine was inapplicable to the allocations of income among contemporary partners. *Rodman*, 542 Fed. 2d 845, p. 857; *Moore*, 70 T. C. 1024. These cases have given birth to a Janus-faced test for partnership allocations. One face looks to an allocation made solely among old partners and finds that this allocation does not violate the Assignment of Income Doctrine. Another face looks to an allocation made between old and new partners and finds that this allocation does violate the Assignment

of Income Doctrine. The two faces see an allocation of the same income or loss; however, the only material distinction between the two faces is the identity of the party or parties receiving the allocation. In effect, the courts determine the status (new partner vs. old partner) of a person is, of itself, determinative of tax questions. The Supreme Court has, on previous occasion, held that the status of a person is not of itself, determinative of tax questions. *Comm. v. Culbertson*, 337 U. S. 733, 746.

The application of the Assignment of Income Doctrine to this case is due to the basic misunderstanding of the entity and aggregate concepts. Generally, Subchapter K adopts the entity approach. Sen. Rept., 83-2 U. S. C. C. A. N. 1954, 2nd Sess., P. 4723. This misunderstanding is indicated by the court's insistence that the pre-existing partner incurred or sustained the loss. The statute, § 702 (b), implies that the partnership incurs or sustains the losses and that the statutory framework implementing the conduit theory is merely a statutory provision for allocating such losses among partners. The Supreme Court held that a partnership is an entity for tax purposes. *U. S. v. Basye*, 410 U. S. 441 (1973); *Federal Taxation of Partners and Partnerships* by McKee, Nelson and Whitmire, 1982 Cum. Supp., No. 2, ¶ 10.02 (3). The application of the Assignment of Income Doctrine to partnerships requires the collapsing of the entity theory. Individual partners are treated as having a fixed and determinable right to the partnership income (notwithstanding IRC § 761(c)) so that the reallocation of income to any new partner is deemed to be an allocation from one partner to another partner, rather than from the partnership among the partners.

The Supreme Court in *Comm. v. Culbertson*, supra, reviewed two prior decisions which were based upon the Commissioner's attempt to apply the Assignment of Income Doctrine to family partnerships. *Comm. v. Tower*, 327 U.S. 280; *Lusthaus v. Comm.*, 327 U.S. 293. The Court held *that once the tax court concluded that there was a valid partnership, it had no right to substitute its judgment for the judgment of the partners with respect to allocating partnership income.* Petitioner maintains this is valid legal precedent with respect to the nonfamily partnerships pr. .biting the application of Assignment of Income Doctrine. The Revenue Act of 1951 added what became IRC § 704 (e) to the 1939 code. In adding this provision, its purpose was to give effect to the Supreme Court decision, not to overrule it. House Report, U. S. C. C. A. N., Vol. 2, 82nd Cong., 1st Sess., 1951, p. 1814. Even though the amendment did provide a restrictive rule regarding the allocation of income, its intent was to give effect to *Culbertson*, supra, and to prevent the wholesale holding by the tax court that family partnerships are invalid. *Culbertson* is an effective precedent applying to nonfamily partnerships especially in light of the 1954 code's strengthening of the entity concept.

Surely, if the doctrine did not apply to family partnership case(until § 704 (e) was adopted), it would be inappropriate to apply the doctrine to nonfamily partnership when there is no similar statutory basis for its application.

The District Court and Eighth Circuit decision sets aside the statutory scheme to decide this case in direct conflict with the rule adopted in *Culbertson*, supra. Consequently, it should fail.

REASONS FOR GRANTING WRIT

Certiorari should be granted when a Federal Court of Appeals has decided a federal question in conflict with applicable decisions of the Supreme Court.

The decision of the District Court and the Eighth Circuit conflict with prior Supreme Court decisions in the following respects:

1. *Statutory Construction.* The lower courts could not support their statutory construction without a complete and utter disregard for the Cannons of Statutory Construction. These Cannons of Construction on numerous occasions have received strong support from the Supreme Court. None of the traditional reasons which would limit or set aside the rules of statutory construction are present in this case.

2. *Factual Conclusions.* The purpose of the motion was to determine whether or not as a matter of law Subchapter K prohibited the allocation of preadmission income or loss to a newly admitted partner. The question was posed in a manner where the facts of this particular case and the facts in any partnership case are irrelevant. The lower courts concluded a factual issue, tax avoidance, in order to base its application of a legal principle. As-

signment of Income Doctrine, to decide this case. The effect of this factual conclusion was to cut the Petitioner off from his right to trial on genuine issues of facts. This was an improper application of the Federal Civil Procedural Rule 56 (c). *Poller v. Columbian Broadcasting System, Inc.*, 368 U. S. 464, 7 L. Ed. 2d 458, 82 Sup. Ct. 486.

3. *Assignment of Income Doctrine.* The lower courts' decision in this case in effect set aside the statutory scheme, entity theory, in order to adopt another, aggregate theory, to premise its application of a doctrine already rejected in prior Supreme Court decisions. To the extent the lower court set aside the entity theory it is in conflict with the prior Supreme Court decision. *U. S. v. Basye*, 410 U. S. 441 (1973). The adoption of the Assignment of Income Doctrine amounts to the application of the doctrine to a nonfamily partnership under the 1954 code, which the Supreme Court would not apply to a family partnership under the 1939 code. *Comm. v. Culbertson*, 337 U. S. 733.

Petitioners feel that the role of the Cannons of Construction, judicial doctrines and legislative intent with respect to the interpretation of Federal taxing statutes is not sufficiently understood. The following is one example of the misunderstanding by each branch of the government.

1. *Executive Branch.* As part of the Tax Reform Act of 1976, Congress changed the deduction for child and dependent care expenses, IRC § 214, to a credit for child and dependent care expenses, IRC § 44A. The Senate Finance Committee stated that one of the purposes of the

change was to allow parents who have custody, but cannot claim the child as a dependent, to claim the credit. Sen. Rept. No. 94-938, P. 133; 1976-3 C. B. Vol. 3, P. 171. The joint committee specifically stated they adopted the Senate Finance Committee's version of the bill. The Internal Revenue Service proceeded to adopt the old regulations under § 214 as the new regulations under § 44A which expressly prohibit a spouse who has custody of a child to claim child care expenses unless such spouse can claim the child as a dependent. This is in direct conflict with the legislative intent behind the revisions and the adoption of the credit.

2. *The Legislative Branch.* In enacting the Revenue Act of 1978, the Senate Finance Committee felt that the term "tangible personal property" as used in IRC § 48 (a) (1) (A) could be expanded merely by *discussing* the term rather than *amending* the statute. U. S. C. C. A. N., Vol. 6, 95th Cong., 2nd Sess. 1978, P. 6880. This action by the Senate Finance Committee clearly shows that they do not appreciate the general rule that it is the intent of the Congress passing the statute, not a later Congress, which is important when interpreting a statute. *Vogel Fertilizer Co.*, S. Ct., No. 80-1251, Decided 1/13/82, 70 L. Ed. 2d 792; *U. S. v. Price,* 361 U. S. 301.

3. *Judicial Branch.* IRC § 704 (b) as in effect for 1975 provided a test which is generally referred to as the Economic Substance Test for testing the partnership's allocation of items among the partners. In two cases, the Commissioner conceded that such section, consequently the test, does not apply to partnership's allocation of bottom line income. *Boynton,* 72 T. C. 1147, Aff'd 649 Fed. 2d 1168 (C. A.-5); *Durand A. Holladay,* 72 T. C. 571, Aff'd

649 Fed. 2d 1176 (C. A.-5). The tax court and the Fifth Circuit devised a new judicial doctrine, which was referred to as the Economic Effect Doctrine, that embodied the sum and the substance of the Economic Substance Test to disallow the allocations in the case. In effect, if the statute did not apply the court was going to develop a new judicial doctrine to replace or expand the statute.

The above clearly indicates that issues concerning statutory construction are not moot and that it is a proper subject matter in need of the Court's attention. Further, the arbitrary dispensation of the Cannons of Statutory Construction in this case is not an isolated case; all segments of the government are overstepping the constitutional limits on their powers with respect to Federal taxing statutes.

Petitioner's attorney read the slogan on the ten cent stamp which is quite appropriate in this case, which states: "Peoples right to petition for redress". Is this right illusionary? Allowing courts to arbitrarily set aside the Cannons of Construction amounts to the granting of a green light to judicial legislation. Such an environment makes it impossible for advisors to properly advise clients with respect to the application of Federal taxing statutes to proposed transactions. Circuit courts, courts of last resort to more than nine out of ten Federal cases, must, when interpreting statutes, apply the Cannons of Construction.

Much press recently has been devoted to the Supreme Court's caseload. Permitting Circuit Courts to arbitrarily disregard the cannons of construction will result in a proliferation of the Supreme Court's caseload because of

conflicts between the decisions of Circuit Courts. Since this case is purely legal in nature, it presents an opportunity for the Court to speak directly and unequivocally about the principles of statutory construction.

Wherefore, Petitioner prays that the Court reverse, in total, the decision of the Court of Appeals for the Eighth Circuit and remand the case to the District Court for the District of Nebraska for further proceedings.

In the alternative, Petitioner prays that the Court:

(A) Reverse the decision of the Court of Appeals for the Eighth Circuit to the extent it improperly concluded facts and to the extent the Assignment of Income Doctrine was relied upon in conflict with prior Supreme Court decisions; and

(B) Vacate the remaining portion of the decision remanding the case to the Court of Appeals for the Eighth Circuit for an interpretation founded upon the application of the Cannons of Statutory Construction.

Respectfully submitted,

JOHN P. RAYNOR
SCHUMACHER, SKUDLAREK, RAYNOR & SMITH

540 Continental Building
Omaha, Nebraska 68102
(402) 342-7745

Counsel for Petitioner